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# Supreme Court of the United States

**October Term, 1973.**

No. 73-1534

KEITH HARRIS,

*Petitioner,*

*vs.*

STATE OF NEW YORK.

**Petition for Writ of Certiorari to the Court of Appeals of the State of New York.**

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January 30, 1974.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974.

No. .

KEITH HARRIS,

*Petitioner,*

*vs.*

STATE OF NEW YORK.

## Petition for a Writ of Certiorari to the Court of Appeals of the State of New York.

The petitioner, Keith Harris, prays that a writ of certiorari issue to review the opinion and judgment of the Court of Appeals of the State of New York rendered in these proceedings on November 8, 1973.

## Opinions Below.

The opinion of the Court of Appeals, as yet unreported, appears at Appendix A, *infra,* page 13. The opinion of the County Court of Broome County is unreported, and appears at Appendix B, *infra,* pages 14 to 24.

## Jurisdiction.

The order or judgment of the Court of Appeals of the State of New York was entered on November 8, 1973. See Appendix A, page 13, *infra.* This petition for certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of this court is invoked under 28 U.S.C. Section 1257 (3).

## Questions Presented.

The petitioner was convicted of operating a motor vehicle while having .12% of blood alcohol by weight in violation of New York *Vehicle & Traffic Law,* Section 1192 (2), and driving while intoxicated in violation of New York *Vehicle & Traffic Law,* Section 1192 (3). The questions thereby arising are:

1. Whether the taking of a blood sample from the body of a defendant in other than a hospital environment is consistent with the Fourth and Fourteenth Amendments.

2. Whether conviction for violation of both New York *Vehicle & Traffic Law,* Sections 1192 (2) and 1192 (3), for the same indictment is consistent with the Jeopardy Clause of the Fifth Amendment.

3. Whether a trial Judge's refusal to properly charge the jury that it should make the final decision as the voluntariness of alleged statements and admissions is consistent with the Fifth Amendment.

## Constitutional Provisions Involved.

Constitution of the United States, Amendment 4.

> "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated * * *"

Constitution of the United States, Amendment 5.

> "* * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; * * *"

Constitution of the United States, Amendment XIV, Section 1:

> "* * * nor shall any state deprive any person of life, liberty, or property without due process of law * * *"

**Statutes Involved.**

New York Vehicle & Traffic Law, Section 1192 (2), states:

> "2. no person shall operate a motor vehicle while he has .12 of one per centum or more by weight of alcohol in his blood, as shown by chemical analysis of his blood, breath, urine or saliva, made pursuant to the provisions of Section eleven hundred ninety-four of this chapter."

New York Vehicle & Traffic Law, Section 1192 (3), states:

> "3. No person shall operate a motor vehicle while he is in an intoxicated condition."

**Statement of Facts.**

The facts relevant to the questions presented by this petition are uncontroverted and therefore may be introduced to the court in summary fashion.

On March 23, 1972, Patrolman William J. Guiles arrived at the scene of a single vehicle accident. There he saw a van removing a 1971 Ford from the side of the road. The defendant was standing alongside the van. Officer Guiles testified that the defendant was the driver of the Ford. The officer also observed that the defendant staggered, his speech was slurred and he smelled of

alcoholic beverages. Upon questioning by Officer Guiles, the defendant admitted that he was the driver of the car. The defendant then admitted he had been drinking and produced his driver's license. According to Officer Guiles, it was at this time he was "forming in my mind to what built up to actually placing him under arrest." Physical coordination tests were conducted at the scene and the defendant was placed under arrest.

At approximately 12:40 A.M. Patrolman Guiles requested a logbook be started on Keith Harris. The defendant was taken by police car to the Vestal Police Station where he arrived at approximately 12:50 A.M. At approximately 12:54 A.M. Patrolman Guiles read the defendant his *Miranda* rights. Prior to this time, no attempt had been made to inform the defendant of his constitutional rights.

Once advised of his rights the defendant refused to make any further statements and requested that his lawyer be called. A telephone call revealed that the attorney was on his way to the Police Station. The attorney arrived thereafter and conferred with the defendant for about a half hour. The defendant then agreed to take a chemical test. The breathalyzer was prepared but after examination was determined by the police to be malfunctioning.

A blood test was then arranged. Dr. Melvin Jones was summoned and arrived approximately an hour later. He then drew a sample of the defendant's blood at approximately 1:55. The sample was then placed in a box. Dr. Jones then conducted several coordination tests on the defendant. He performed every test successfully. The withdrawal of blood and the coordination tests were conducted in a basement room at the Vestal Police Station.

The defendant was then released in the custody of his attorney. The blood sample was later analyzed using gas liquid chromatography.

A suppression hearing was held before Hon. Harold Clark, Town Justice, Town of Vestal on August 2, 1972. Defendant's motions to suppress statements made before he was given his *Miranda* warnings were denied. The judge also denied defendant's motion for an adjournment of trial pending receipt of the hearing transcript.

At trial the defendant renewed his motions to suppress all pre-*Miranda* statements, moved to dismiss the prosecution for failure to prove the case beyond a reasonable doubt, and moved to suppress the results of the blood test. All such motions were denied by the trial. court. The trial court also denied defendant's request that the jury be charged as to its power to determine the voluntariness of alleged statements and admissions of the defendant.

The defendant was convicted of driving while intoxicated and driving with more than .12% blood alcohol.

## Reasons for Granting the Writ.

### I. The taking of a blood sample from the body of defendant in other than a hospital environment is violative of the Fourth and Fourteenth Amendments and results from samples so obtained must be suppressed.

*Schmerber v. California,* 384 U. S. 757 (1966), involved the extraction of blood from a defendant by a physician in a simple, medically acceptable manner in a hospital environment. This court held that under these conditions there was no due process or search and seiz-

ure violations. In addition, since this evidence was not testimonial in nature, the defendant could not assert a right against self-incrimination or a right to counsel. However, this court also concluded:

> "That we today hold that the Constitution does not forbid the State's minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or instructions under other conditions." *Id.* at page 772.

In particular the court was concerned:

> "* * * with the serious question which would arise if a search involving use of medical technique, even of the most rudimentary sort, were made by other than medical personnel or in other than a medical environment—for example, if it were administered by police in the privacy of the stationhouse. To tolerate searches under these conditions might be to invite an unjustified element of personal risk of infection and pain." *Id.* at pages 771-772.

The instant case involves exactly that problem. A blood sample was extracted from the body of the defendant at the police station. As such it was an unreasonable search and seizure in violation of the Fourth and Fourteenth Amendments.

A similar situation is involved in border searches of body cavities. Such searches have been held constitutionally permissible where they are conducted by a licensed physician in a medical environment. *U. S. v. Summerfield*, 421 F. 2d 684 (9th Cir. 1970); *Rivas v. U. S.*, 368 F. 2d 703 (9th Cir. 1966), cert. denied 386 U. S. 915 (1967). In *U. S. v. Summerfield, supra,* the Court of Appeals af-

firmed a conviction for narcotics smuggling based on a rectal search but emphasized that:

> "The examination was conducted in the same office where the doctor, a licensed physician, examined his regular patients." *Id.* at 685.

In *Rivas v. U. S., supra,* the Court of Appeals expressly made reference to the fact that since the search of the defendant's rectum was made by a physician in his office, according to accepted medical practice, the appellant therein did not challenge the manner and means of the search. *Id.* at 711.

The taking of a blood test involves the actual breaking into the body. As such it is a much severer intrusion into the body then a mere abdominal cavity search. Such an invasion by one other than a licensed physician or in other than a medical environment is offensive under the Fourth and Fourteenth Amendments. See, *Rochin v. California,* 342 U. S. 165 (1951).

**II. Trial and conviction of one person for violations of both Vehicle & Traffic Law, Sections 1192 (2) and 1192 (3), arising from the same incident, violates the double jeopardy clauses of the New York and United States Constitutions.**

Keith Harris was arrested for driving while intoxicated on March 23, 1972. During his interrogation, Mr. Harris submitted to a blood test. The defendant was subsequently convicted of both driving while intoxicated and of operating a motor vehicle with .12 of 1% by weight of alcohol in his blood.

Both the New York and United States Constitutions prohibit a defendant from being placed twice in jeopardy for the same crime:

> "No person shall be subject to be twice put in jeopardy for the same offense * * *" N. Y. Constitution, Article 1, Section 6.
>
> "* * * nor shall any person be subject for the same offense be twice put in jeopardy of life or limb * * *" U. S. Constitution, Amendment 5.

The double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our heritage and applies to New York through the Fourteenth Amendment. *Benton v. Maryland,* 395 U. S. 784 (1969).

The *New York Vehicle & Traffic Law,* Section 1192 (2) and (3), states:

> "2. No person shall operate a motor vehicle while he has .12 of one per centum or more by weight of alcohol in his blood, as shown by chemical analysis of his blood, breath, urine or saliva, made pursuant to the provisions of Section eleven hundred ninety-four of this chapter.
>
> "3. No person shall operate a motor vehicle while he is in an intoxicated condition."

The only issue in the instant case is whether a conviction for either driving while intoxicated or driving with .12 of 1% of blood alcohol serves as a bar to conviction of the other if both arise from the same incident.

Legislative reports reveal that Sections 1192 (2) and 1192 (3) of the Vehicle & Traffic Law were considered as alternative means of removing the drunk driver from

the road. The whole impetus of the legislative reports is that these crimes are identical. According to the "Evidence of Intoxication," S. 27-B, Caemmerer, Ch. 495, cited in 1971 N. Y. State Legislative Annual 465:

> "Vehicle and Traffic Law, Secs. 1192, 1195. Present Law. In drunken and drug cases, New York Law provides for the following presumption to be given as evidence of intoxication based on the percentage of weight of alcohol as determined by chemical tests.
>
> "1. 0.05% or less—presumptive evidence that the motorist was not intoxicated.
>
> "2. 0.08% or more prima facie evidence that the motorist's ability to drive was impaired by consumption of alcohol (DWAI).
>
> "3. 0.12% or more (DWI)."

In S. 5110-C, Caemmerer, *et alia,* Chapter 275, as cited in 1970 N. Y. Legislative Annual 482, Senator Caemmerer wrote:

> "This bill strengthens the provisions of the Vehicle and Traffic Law relating to driving while under the influence of alcohol by making it a misdemeanor for one to operate a motor vehicle when the alcohol content in his blood exceeds 0.15 percent.
>
> "This measure, which I recommended in my Annual Message to the Legislature, should have a significant effect in reducing the human suffering and carnage caused by drinking drivers.
>
> "A recent study showed that approximately 44 percent of the drivers involved in fatal accidents in New York had a blood alcohol content in excess of the extremely high level of 0.15 percent.

"Thus, it is clear that the ability of any driver with a blood alcohol level of 0.15 per cent or above is so grossly impaired that safe driving is impossible.

"The bill, which takes effect January 1, 1971, also makes a number of clarifying and conforming amendments to the current laws concerning driving while impaired and driving while intoxicated."

And, in S. 5110-A, Caemmerer, Chapter 275, as cited in 1970 N. Y. Legislative Annual 365, the correlation between the driving while intoxicated and the .15 charges was again emphasized.

"A recent study by the United States Department of Transportation indicated that some 25,000 traffic deaths in the United States each year, or approximately half of all traffic fatalities, involve drinking. Heavy drinkers constitute the most serious problem.

"The same federal report indicated that even blood alcohol concentrations of less than .10 percent result in serious impairment of a driver's ability. At levels of .15 percent and above, ability to drive is so grossly impaired, and such a serious hazard is created, that the strict approach of this bill with respect to these levels is necessary and fully warranted. In spite of such convincing evidence, studies and our own experience indicate that a major dimension of the problem is that even where such high levels of alcohol are involved, convictions are difficult to obtain under existing law and offending drivers are often allowed to return to the road to continue to endanger the lives of innocent people.

It is clear from these analyses that the New York Legislature viewed driving a motor vehicle with a blood alcohol content of more than .12 of 1% blood alcohol as identical with driving while intoxicated.

According to *Blockburger v. United States,* 284 U. S. 299 at 304 (1932), the "* * * applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." See also, *Colle v. Henderson,* 350 F. Supp. 1010 (W. D. La. 1972); *People v. McDonough,* 39 A. D. 2d 188, 333 N. Y. S. 2d 128 (3rd Dept. 1972).

It is submitted a court may only convict and sentence on one violation of Vehicle & Traffic Law, Section 1192 (2) and (3).

**III. The refusal of a trial judge to include in his charge that the jury was to make the final determination as to the voluntariness of all alleged confessions deprived defendant of his constitutional right to a fair trial.**

In the instant case, defense counsel requested that the jury be charged as to their ability to decide whether any admissions and statements allegedly made by the defendant were voluntary under the rules established in *Escobedo v. Illinois,* 378 U. S. 478 (1964), and *Miranda v. Arizona,* 384 U. S. 486 (1966). The trial judge denied the motion. Subsequently the jury interrupted its deliberation to ask if it could consider admissions made by the defendant before he was advised of his rights.

*People v. Huntley,* 15 N. Y. 2d 72, 255 N. Y. S. 2d 838 (1965), adopted the so-called Massachusetts procedure described in *Jackson v. Denno,* 378 U. S. 368 (1963):

> "* * * under which the jury passes on voluntariness only after the judge has fully and independ-

> ently resolved the issue against the accused, and has made express findings upon the disputed fact question of voluntariness. We favor the Massachusetts rule for several reasons, the first being that our State Constitution (Art. I, Sec. 2) mandates a jury trial of the issue of voluntariness. Another consideration supporting this choice is that the Massachusetts rule not only meets the demand of Jackson—Denno that 'a proper determination of voluntariness be made prior to the admission of the confession to the jury which is adjudicating guilt or innocence' * * * but also provides a defendant with an opportunity before the jury itself to challenge the confession." *Id.* at 78, 255 N. Y. S. 2d 843.

The failure of the jduge in the instant case to charge that the jury is the final arbitrator of the voluntariness of alleged statements violated the *Huntley* rule and constituted reversible error. The effect of this failure to instruct on the jury is amply evidenced by their break in deliberation. No additional instructions after that point could remedy the prejudice already done to the defendant.

## Conclusion.

For these reasons, a writ of certiorari should issue to review the judgment of the New York Court of Appeals.

Respectfully submitted,

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## APPENDIX A.

### Certificate Denying Leave to Appeal to the Court of Appeals.

COURT OF APPEALS,

STATE OF NEW YORK.

Before:

Hon. Domenick L. Gabrielli, Associate Judge

---

THE PEOPLE OF THE STATE OF NEW YORK

*against*

KEITH HARRIS.

---

I, DOMENICK L. GABRIELLI, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein, there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Bath, New York, Nov. 8, 1973

DOMENICK L. GABRIELLI
Associate Judge

## APPENDIX B.

### Opinion (Decision) of County Court, Broome County.

STATE OF NEW YORK, COUNTY COURT,

BROOME COUNTY.

THE PEOPLE OF THE STATE OF NEW YORK

*vs.*

KEITH HARRIS.

Twining, Nemia, Hill & Griffen (Richard M. Hill, Esq., of counsel), Binghamton, New York, Attorney for Defendant.

Patrick D. Monserrate, District Attorney (Frederick J. Meagher, Jr., Esq., of counsel), Binghamton, New York, Attorney for Plaintiff.

STEPHEN SMYK, J.:

Appeal from a judgment of the Justice Court, Town of Vestal, New York rendered August 3, 1972 upon a jury verdict convicting the defendant of operating a motor vehicle while he had more than .12 of one per centum or more by weight of alcohol in his blood and operating a motor vehicle while in an intoxicated condition in violation of Sections 1192(2) and 1192(3) of the Vehicle and Traffic Law respectively.

On March 23, 1972 at approximately 12:25 a. m., Town of Vestal Patrolman William J. Guiles was on routine patrol when he received a radio call of an accident at Route 434 and the Old Vestal Road.

He arrived at the scene a few minutes later and observed a van removing a disabled 1971 Fork pickup truck from a ditch alongside the road. No other vehicles were in the immediate area. The defendant was standing beside the van and told the officer he had driven the accident vehicle. The defendant then attempted to pay the van driver for coming to his aid.

At about this time the officer noted that the defendant's voice and speech pattern were slurred and that he was swaying and staggering somewhat. The officer also smelled a distinct odor of alcohol on the defendant's breath.

The defendant refused a request for proper identification and the officer again asked him for it. At this time, and not in response to further inquiry, the defendant stated that he was "drunk," and that he had been driving while in that condition. According to the officer, the defendant persistently asked for a "break" saying, "I don't do this very often."

The defendant produced his driver's license following a fourth request for identification. The officer then checked the license plate of defendant's vehicle and found it registered to the company which employed the defendant.

After the defendant had difficulty performing several physical coordination tests at the scene, he was placed under arrest and taken to Vestal police station. Almost immediately upon arriving at the station the arresting officer gave him his *Miranda* warnings and he requested that his lawyer be summoned.

The defendant's attorney arrived at the station about one-half hour later. Shortly thereafter, the defendant, with the concurrence of his counsel, consented to a blood test and Dr. Melvin Jones was called.

Upon his arrival, Dr. Jones gave the defendant a routine physical examination and at 1:55 a. m. withdrew a sample of the defendant's blood.

Later analysis of the blood revealed that there was .27 of one per centum by weight of alcohol in defendant's blood.

A Huntley hearing was held before the trial judge on August 2, 1972. The defendant's motion to suppress statements made before he was given his *Miranda* warnings was denied and the judge also denied his motion for an adjournment of trial pending receipt of the hearing transcript.

On the next day trial was had resulting in the convictions.

The defendant raises five separate questions on appeal:

(1) That he was convicted solely upon evidence of statements and admissions made by him without additional proof that the offenses charged had been committed;

(2) That his alleged statements and admissions were elicited from him by the investigating officer in violation of his constitutional rights under *Miranda v. Arizona*, 384 U. S. 436 (1966);

(3) That the withdrawal of the blood sample from his body in the stationhouse violated his Fourth and Fourteenth Amendment rights;

(4) That the failure of the trial judge to grant an adjournment of the trial to allow defendant to secure a transcript of the Huntley hearing violated his right to a fair trial; and

(5) That the trial judge improperly refused to charge the jury that it should make the final decision as to the voluntariness of the defendant's statements and admissions and that such refusal constitutes reversible error.

While the defendant had raised two further points on appeal regarding questions of double jeopardy and double

punishment, both he and the prosecution have stipulated that the recent decision of *People v. Rudd* ( A. D. 2d , 343 N. Y. S. 2d 17) properly resolves those issues. We will, therefore, omit any discussion of these.

The defendant's first contention of error is that his conviction, with the aid of his statements and admissions, was improper in that the prosection failed to sufficiently corroborate his admissions.

Section 60.50 of the Criminal Procedure Law states:

> "A person may not be convicted of any offense solely upon evidence of a confession or admission made by him without additional proof that the offense charged has been committed."

This section retains the corroboration rule enunciated in Section 395 of the former Code of Criminal Procedure.

The theory behind requiring corroboration of a confession or admission is to avoid the danger that one may confess to a crime when, in fact, no crime has been committed. (*In re Houseworth,* 53 Misc. 2d 375, 376; *People v. Lytton,* 257 N. Y. 310.) Furthermore, any form of proof, whether direct or circumstantial, will satisfy the criteria under CPL 60.50. (*People v. Jennings,* 40 A. D. 2d 357, 361.)

There is ample authority for the position that the additional evidence which must be produced to warrant a finding against a defendant based in part on his confession or admissions, need not apply to every element of the crime charged, nor need a confession or admission itself be corroborated. (*Matter of Ronny,* 40 Misc. 2d 194, 199 and cases cited; *People v. Warner,* 152 Misc. 607, affd. 244 App. Div. 833, affd. 269 N. Y. 597.) The confession or admission has been treated as competent proof of the body of the offense, that is, not only of the subjective criminal act, but also the criminal agency of the defendant, although insufficient without corroboration to justify a conviction. (*People v. Jaehne,* 103 N. Y. 182, 200.)

In *People v. Brasch* (193 N. Y. 46), defendant's confession that he had murdered his wife, together with evidence indicating motive and the disappearance of the defendant's wife in his company, was held sufficient for conviction when drowning without more had been the cause of death.

It has been held, however, that:

> "[t]he corroboration required by section 395 must be such independent evidence as will establish the corpus delicti or the body of the crime without any reliance upon the confession itself. Simply stated the evidence which is independent of the confession must establish each and every element of the crime and then the confession may be used to show that the crime, independently established, was committed by the confessing defendant."

(*People v. Ulisano,* 18 A. D. 2d 432, 435, *citing People v. Roach,* 215 N. Y. 592, 600.)

Nevertheless, even when applying the strict standard of *Ulisano,* we find that the confession here was adequately corroborated to warrant defendant's conviction.

We note that in every driving while intoxicated case there are two elements to be proven: (1) that the defendant was operating a motor vehicle, and (2) that he was intoxicated at the time of such operation. It is apparent from the defendant's brief that he does not contest that the prosecution produced additional evidence of his intoxication. He claims, however, that the People failed to corroborate his admission that he was the driver of the vehicle in question. We disagree.

At the trial it was shown that the defendant was the only individual, other than the van driver, found at the accident scene who could have been driving the disabled vehicle. The vehicle was licensed and registered to Harris Foodlines, the defendant's company. Furthermore, the defendant's conduct at the scene, including his attempted

payment to the van driver and his frequent requests for a "break," leads to one inescapable conclusion: that he was operating the motor vehicle being removed when the officer arrived.

Under the circumstances, the defendant's claim that it was necessary for the People to show the nonexistence of other occupants who might have been driving is without merit. The additional evidence necessary to satisfy the statute may be sufficient even though it fails to exclude every reasonable hypothesis save that of guilt. (*People v. Jaehne,* 103 N. Y. 182, 199, *supra.*)

While the defendant has cited *People v. Stover* (38 Misc. 2d 668) in support of his position, that case is not directly on point. In *Stover,* the defendant was found one city block from the scene of the accident and never made any admissions regarding his operation of the accident vehicle. The corroboration statute was, therefore, never at issue.

We also conclude that the questioning of the defendant at the scene of the accident by the arresting officer did not violate the defendant's constitutional rights. A police officer has traditionally been entitled to make preliminary inquiries regarding the facts and circumstances of an accident without prior warning each individual to whom he speaks of his *Miranda* rights. The defendant's interpretation of the law would require an officer at the scene of an accident to first read the *Miranda* warnings and then determine who was involved in the accident, or whether anyone was injured and required medical attention.

The concept of "focus" is, of course, essential to a consideration of cases arising after *Escobido v. Illinois* (378 U. S. 478) but prior to *Miranda v. Arizona* (384 U. S. 436). However, the Court in *Miranda* at pp. 477-478 also stated that:

> "Our decision is not intended to hamper the traditional function of the police officers in investigating crime • • • General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding • • • In such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present.

The decision as to whether this exception is available in this case tends to resolve itself by a determination of whether the police officer had already identified his probable suspect, or whether he was inquiring generally. We believe that the type of general questioning which was conducted at the accident scene here was unfocused and that the officer's inquiries, particularly regarding whether the defendant was the driver of the vehicle in question, were merely part of the "fact-finding process." *State v. Heisdorfer,* 164 N. W. 2d 173 (Iowa).

Our discussion above also tends to blend with a consideration of the "volunteered statement" cases. *Miranda* does not make all confessions and admissions inadmissible. "Volunteered statements" are not interdicted. "Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence • • • Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding • • •" (*Miranda v. Arizona, supra,* p. 478, citing *People v. Dorado,* 398 P. 2d 361, 371.)

We regard the defendant's statements here as voluntary, spontaneous admissions which were not elicited as a result of any "custodial interrogation" on the part of the police. (*People v. McKie,* 25 N. Y. 2d 19.) Specifically, his admissions regarding intoxication and his subsequent pleas for mercy were made without prompt-

ing by the officer and were in no measure responsive to the officer's inquiries or requests.

Regarding the defendant's third contention of error, we have examined the cases cited by defendant and conclude that defendant's Fourth Amendment rights were not violated *solely* because the blood test was performed at the stationhouse. (*Schmerber v. California*, 384 U. S. 757.)

In *Schmerber, supra*, the petitioner's blood was taken, over his objection, by a physician in a "hospital environment" according to accepted medical practice. The court, therefore, was not presented with the issue arising here. The court did indicate, however, that serious questions might arise "if a search involving use of a medical technique, even the most rudimentary sort, were made by other than medical personnel or in other than a medical environment—for example, if it were administered by police in the privacy of the stationhouse." (384 U. S. 757, 771-772.) It is apparent the Court was primarily concerned that tolerating searches under such conditions might invite "an unjustified element of personal risk of infection and pain" to a defendant. (384 U. S. 757, 772.)

In the present case, no restraint was used. There was no injury or harm to the person and no discomfort beyond that experienced in ordinary and similar routine procedures. The Supreme Court has recognized that "the blood test procedure has become routine in our every day life • • •" (*Schmerber v. California, supra*, p. 771, n. 13 *citing Breitharpt v. Abram*, 352 U. S. 432, 436.) Indeed, there is nothing here to indicate that anything occurred to infringe upon any personal right of the defendant beyond what was necessary for the blood test itself. (*U. S. v. Summerfield*, 421 F. 2d 684, 685.)

Furthermore, the blood sample was not withdrawn by the "police in the privacy of the stationhouse" but rather by a licensed, practicing physician of this state and in the

resence of the defendant's counsel. Finally, the blood ample was taken according to accepted medical practice nd every attempt was made to keep any "risk of infec- ion and pain" to the defendant within justifiable limits. Accordingly, we conclude from the present record that he blood sample was taken in a reasonable manner and hat there was no violation of the defendant's rights un- er the Fourth and Fourteenth Amendments.

Fourthly, the defendant argues that the failure of the rial judge to permit an adjournment of trial in order o allow him to be provided with a transcript of his Hunt- ey hearing violated his right to a fair trial.

In *People v. Montgomery* (18 N. Y. 2d 993) the Court f Appeals held that the statutory right to a transcript f a preliminary hearing (former Code of Criminal Pro- edure, §206) could not be denied to a defendant because f indigency. The Court went on to add one caveat, how- ver: "[T]he request for a transcript should be made ar enough in advance of trial to give the state a reason- ble amount of time to transcribe the minutes and to void the necessity of suspending the trial pending the roduction of the transcript." (18 N. Y. 2d 993, 994- 95.)

Later, in *People v. Abdullah* (23 N. Y. 2d 676) it was eld that the failure to furnish a defendant with a free aily copy of the proceedings at his suppression hearing id not violate any of his constitutional rights. The *bdullah* rationale was subsequently followed by the ourt in *People v. Zabrocky*, 26 N. Y. 2d 530.

Recently, in *People v. West* (29 N. Y. 2d 728) the Court uled that where a Huntley hearing, involving only one itness, took place six days prior to the calling of that itness at trial, a "request for a transcript cannot be quated with a request for a daily transcript of trial min- tes *or a request made on the eve of trial* • • •" (P. 729; talics ours). Judge Breitel, in a vigorous dissent, how-

ever, noted that West's request was made without intervening court days, and, therefore, the testimony at the hearing was still fresh in the minds of the defendant and his counsel. He concluded that "Under the circumstances of this case to require the hearing minutes on the next court day is the equivalent of requiring daily minutes * * * [which] *People v. Zabrocky* * * * held * * * not necessary." (29 N. Y. 2d 728, 729.)

Hence, even under former section 206 of the Code of Criminal Procedure a defendant was not entitled to a transcript of a Huntley hearing on the eve of trial. Since that section was omitted from the Criminal Procedure Law it follows that a defendant's rights under the present law are no greater than under the prior law.

In the present case, because the Huntley hearing was conducted one day with the trial on the next, we hold that defendant had no absolute right to the minutes of that proceeding before trial.

We are further pursuaded in this regard since section 710.40 (subd. 3) of the CPL states, in pertinent part, that "* * * in the case of a pre-trial motion made in a local criminal court, such court must, upon request of the People, determine it at trial." The Practice Commentary accompanying that section notes that the innovation is based upon the practical consideration that pre-trial determinations may prove too cumbersome in some lower courts. We doubt if the legislature would have decreed this procedure if a defendant was unconditionally entitled to a transcript of a suppression hearing or an adjournment to obtain one.

Finally, the defendant contends that the trial judge refused to include in his charge that the jury was to make the final determination as to the voluntariness of defendant's statements and admissions and that such refusal deprived the defendant of his constitutional right to a fair trial. While the trial judge could have improved

upon the language of his charge by at least paraphrasing sections 60.45 and 710.70 of the CPL, we, nevertheless, have reviewed the charge as a whole and determine that the jury was adequately instructed in this regard.

Affirmed and remanded for further proceedings consistent with *People v. Rudd, supra.*

Dated: August 30th, 1973, Binghamton, New York

s/ STEPHEN SMYK
Broome County Judge